IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 9, 2006 Session

DONNA MELINDA WHITE v. WILLIAM EDMUND WHITE

Appeal from the Circuit Court for Hamilton County
No. 05D179 W. Neil Thomas III, Judge

No. E2006-00595-COA-R3-CV - FILED JANUARY 10, 2007

In this divorce case, Wife appeals the trial court's division of Husband's 401(k) retirement plan, the equal division of the marital estate, and assessment of court reporter and appraiser's fees. Husband appeals the amount and duration of the award of rehabilitative alimony to Wife. After thorough review of the record and applicable authorities, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Selma Cash Paty, Chattanooga, Tennessee, for the appellant Donna Melinda White.

Grace Elaine Daniel, Chattanooga, Tennessee, for the appellee William Edmund White.

OPINION

I. Background

This appeal arises from a suit for divorce filed by Donna Melinda White ("Wife") against William Edmund White ("Husband") upon the grounds of irreconcilable differences and inappropriate marital. At the time the divorce was filed, Wife was thirty-six years of age and Husband was forty-seven years of age. The 11-year marriage was without children.

After a bench trial, the trial court entered its final decree and incorporated memorandum opinion which, *inter alia*, granted Wife a divorce, classified property owned during the marriage as marital or separate, and valued and divided such property between the parties. The court awarded Wife her separate property valued at $8,300; Husband his separate property valued at $212,331, including a portion of Husband's 401(k) in the amount of $201,706; each party an equal share of the marital property valued at $512,999; rehabilitative alimony to the Wife in the amount of $1,800 per

month for a period of five years; and $6,000 for attorney's fees and costs incurred. This appeal by Wife followed.

II. Issues

Wife presents three issues for our review which we restate as follows:

1) Whether the trial court erred in classifying as Husband's separate property a portion of the appreciation in value of Husband's retirement plan that was conceded to be Husband's separate property.

2) Whether the trial court erred in dividing the marital assets equally between the parties.

3) Whether the trial court abused its discretion by failing to order Husband to pay court reporter's fees and appraiser's fees incurred by Wife.

By way of separate issue, Husband contends that the trial court's award of alimony to Wife was excessive in amount and duration.

III. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

IV. Analysis

A. Retirement Plan

The first issue we address concerns the trial court's classification and distribution of funds accrued during the marriage on Husband's retirement plan designated the Bechtel Trust & Thrift Plan ("the Bechtel Plan" or "the Plan").

The Bechtel Plan is a 401(k) retirement plan provided to Husband by his employer with no guaranteed rate of interest and consisting of stocks, bonds, and various money instruments. The value of the Plan at the time of the marriage was $99,647 and that amount remained the separate property of Husband at the time of divorce. During the marriage, total funds in the Plan increased by $399,148 due to post-marital contributions in the amount of $144,000 and post-marital market appreciation in the amount of $255,148. The trial court determined that $102,059 of the total post-marital appreciation of $255,148 constituted appreciation of the pre-marital funds of $99,647. Noting that all appreciation to the Plan was market-driven and that Wife made no contribution to the preservation and appreciation of the Plan, the trial court concluded that Husband should be awarded

as his separate property this $102,059 along with the $99,647 that was in the Plan at the time of marriage for a total separate property distribution to Husband from the Plan of $201,706. The remaining balance, attributable to the post-marital contributions of $144,000 and post-marital appreciation associated with that amount totaling $153,088, was distributed as marital property. A breakdown of the value of the Plan and the trial court's division is as follows:

Husband's 401(k) Plan:

Value at time of marriage	$ 99,647
Post-marital contributions	144,000
Post-marital market appreciation	255,148
Total value	$ 498,795

Trial Court's Division:

	Husband	Wife
Value at time of marriage	$ 99,647.00	$ 0
Post-marital contributions	72,000.00	72,000.00
Post-marital market appreciation		
A) Based on value at marriage	102,059.00	0
B) Based on post-marital contributions	76,544.50	76,544.50
Total	$ 350,250.50	$ 148,544.50

Wife argues that the trial court erred in awarding Husband the $102,059 appreciation as his separate property and maintains that all post-marital appreciation to the Plan should have been classified as marital property. We disagree.

We begin with the definition of marital property contained in T.C.A. § 36-4-121(b):

> (1)(A) "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, . . ., and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date . . . . All marital property shall be valued as of a date as near as

> possible to the date of entry of the order finally dividing the marital property.

With specific regard to retirement and pension plans associated with employment, T.C.A. § 36-4-121(b) further provides:

> (B) "*Marital property" includes* income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation and *the value* of vested and unvested pension, vested and unvested stock option rights, *retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage*.

(Emphasis added).

As noted by this state's Supreme Court, "retirement benefits accrued during the marriage are marital property subject to equitable division even though the non-employee spouse did not contribute to the increase in their value." *Cohen v. Cohen*, 937 S.W.2d 823, 830 (Tenn. 1996). That portion of T.C.A. § 36-4-121(b)(1)(B) that refers to retirement benefits is unrelated to that portion of the statute requiring that each party have substantially contributed to the preservation and appreciation of a separate property interest before appreciation on such separate property will be considered marital property. *Franklin v. Franklin*, No. 03A01-9410-CV-OO364, 1995 WL 371573, at *2 (Tenn. Ct. App. E.S., filed June 21, 1995). The preliminary question we must answer in the matter *sub judice* is whether that portion of the Bechtel Plan that belonged to Husband at the time of the parties' marriage is a retirement benefit under T.C.A. § 36-4-121(b)(1)(B). Based upon the decision of the Tennessee Supreme Court in *Langschmidt v. Langschmidt*, 81 S.W.3d 741 (Tenn. 2002), we are compelled to the conclusion that it is not.

Under the facts in *Langschmidt*, the husband's assets at the time of marriage included Individual Retirement Accounts ("IRAs") that were in part funded with Husband's premarital earnings and in part with the rollover of Husband's employer-sponsored 401(k) which the husband conceded to be marital property. There was no proof that the wife had substantially contributed to the preservation and appreciation of the IRAs not attributable to the 401(k) rollover. Wife argued that IRAs are retirement benefits by definition and therefore any increase in their value during the marriage constituted accrued retirement benefits and was marital property under T.C.A. § 36-4-121(b)(1)(B). The Court disagreed, holding that to the extent funded with premarital earnings, the husband's IRAs were not retirement benefits under T.C.A. § 36-4-121(b)(1)(B). In so holding, the Court referenced the following language from *Cohen* setting forth the rationale for treating pension benefits accrued during the marriage as marital property:

> To the extent earned during the marriage, the benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living

> or would have been converted into other assets divisible at dissolution . . . . [R]etirement benefits have been described as part of the consideration earned by an employee, and as a form of deferred compensation provided by the employer for work already performed.

Id. at 749.

The Court held that, with the exception of the 401(k) rollover, the husband's IRAs were not retirement benefits under T.C.A. § 36-4-121(b)(1)(B) because they did not represent deferred marital compensation, but rather, were funded with premarital earnings. Instead, the Court found the premarital portion of the IRAs to be the husband's separate property and ruled that any appreciation in the value of that portion was not marital property in the absence of proof that the wife had substantially contributed to its preservation and appreciation. Likewise, in the case now before us, the $99,647 that was in the Plan at the time of the parties' marriage, and conceded to be Husband's separate property, did not represent deferred marital compensation provided by Husband's employer during the marriage. Accordingly, the trial court properly classified any post-marital appreciation on the $99,647 as Husband's separate property since there was no proof of Wife's substantial contribution to its preservation and appreciation.

Wife also contends that the trial court abused its discretion in determining the amount by which Husband's portion of the Bechtel Plan had appreciated during the parties' marriage. We disagree.

The trial court's final divorce decree sets forth its calculations pertinent to valuation of the Bechtel Plan as follows:

> [T]he total in the fund on November 30, 2005 was $498,795, an increase [during the marriage] of $399,148. The total marital funds in said account are $297,089.00 which consists of $144,000.00 in contributions during the marriage and $153,089.00 of appreciation on said contributions during the marriage which was entirely market-driven. The Court determined that $144,000.00 is the amount of the [Husband's] contributions during the marriage based upon the testimony of [Husband] that he contributed $6,000 a year to said fund and matched that with company contributions of the same amount as shown on the report resulting in $144,000.00 in contributions during the 12 year marriage. This Court determined that the appreciation on the pre-marital funds is $102,059.40, which is 40% of the total appreciation which the Court found was entirely market-driven and there was no evidence that [Wife] substantially contributed to the preservation and appreciation of said funds. The Court arrived at this percentage because the premarital contributions are 40% of the total of the premarital funds plus the contributions during the marriage. ($99,647.41 premarital funds plus $144,000.00 marital contributions

> = $243,647.41 and $99,647.41/$243,647.41 = 40% and $255,148.50 total appreciation x 40% = $102,059.00 pre-marital appreciation). The Court then added the pre-marital funds of $99,647.00 plus the pre-marital appreciation of $102,059.00 which totaled $201,706.00 which the Court found was the separate property of defendant. The Court then subtracted $201,706.00 from the total amount in the 401(k) at the time of the hearing which was $498,795.00 resulting in $297,089.00 as the marital property in said account.

The value of a marital asset is a matter of fact to be determined by the trial court after considering relevant evidence, and the trial court, in its discretion, is at liberty to value a marital asset within the range of submitted evidence. *Brock v. Brock*, 941 S.W.2d 896, 902 (Tenn. Ct. App. 1996). In *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001), the Tennessee Supreme Court stated as follows regarding the standard of review as to abuse of discretion:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

We do not find that the evidence preponderates against the above stated findings of the trial court regarding the value of the Bechtel Plan or the post-marital appreciation of Plan funds that were designated to be Husband's separate property. Wife's contention that the trial court abused its discretion in its valuation of these assets is without merit, especially in light of the fact that Wife presented no argument as to an alternate value for this asset.

B. Division of Marital Property

The next issue we address is whether the trial court erred in its division of marital property. As we have noted, the trial court decreed that the marital assets be divided equally. Wife cites *Bookout v. Bookout*, 954 S.W.2d 730 (Tenn. Ct. App. 1997), wherein we noted that while there is a presumption that marital property is owned equally, there in no presumption favoring equal division of marital assets and it is rather the duty of the court to reach an equitable division based upon its consideration of the factors set forth at T.C.A. § 36-4-121(c). Wife contends that an equal division was not equitable under the circumstances in this case and that proper consideration of the statutory factors dictates that she receive additional marital assets. We do not agree.

In determining what constitutes an equitable division of marital property, T.C.A. § 36-4-121(c) provides that the court is required to consider "all relevant factors," which include:

> (1) The duration of the marriage;
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
> (4) The relative ability of each party for future acquisitions of capital assets and income;
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
> (6) The value of the separate property of each party;
> (7) The estate of each party at the time of the marriage;
> (8) The economic circumstances of each party at the time the division of property is to become effective;
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
> (10) The amount of social security available to each spouse; and
> (11) Such other factors as are necessary to consider the equities between the parties.

A trial court is allowed wide discretion in dividing marital assets, and its decision in that respect is to be given "great weight" by this Court. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991).

Wife argues that she sacrificed her own career and educational opportunities to travel with Husband at his request. The record shows that Husband's construction job with the Bechtel Corporation has required frequent relocation and that Wife testified that, as a result, the parties had moved twenty to twenty-five times during the marriage. Given the nature of his employment, Husband agreed that it would not have made sense for Wife to seek employment; however, he also testified that he did encourage her to pursue her education, which she did not do. Wife indicated no specific career opportunities she would have pursued had she been free to do so and admitted that at the time of trial, she was voluntarily employed on a part-time basis only. Wife further admitted that during the four years preceding trial, she had been living in the same place and had not been required to move or travel with Husband, and yet she had taken no steps to pursue her education during that time. Accordingly, it appears that when Wife was free to pursue educational opportunities, she chose not to do so despite Husband's encouragement. Wife notes that during the course of the job-related relocations around the country, she assumed responsibility for packing and unpacking and finding and furnishing the parties' living quarters. She also prepared all of Husband's

meals. Wife further notes that she also contributed to the appreciation of marital assets by finding a house for the parties to purchase which, four years later, had substantially increased in value. While we do not deny the value of these contributions by Wife, we believe that in this case, they are exceeded by the contributions of Husband as wage earner and Husband's sacrifice in seeking employment outside the United States which allowed the parties to enjoy a higher standard of living. Although the parties did travel and live together initially, for the final three years of the marriage Husband, unaccompanied by Wife, worked in California for six months, New York for one year, England for five months, and Iraq for one year. We realize that Husband was awarded substantially more separate property than Wife and that he currently earns substantially more money than Wife. However, Wife is in good health, was only thirty-six years old at the time of trial, is more than ten years younger than Husband, and was awarded sufficient spousal support to fund education and training that will qualify her for more lucrative employment. Upon considering all of the statutory factors and particularly in light of the relative brevity of the parties' marriage, we do not conclude that the evidence preponderates against the trial court's ruling as to division of marital property.

C. Discretionary Costs

The next issue we address is whether the trial court abused its discretion in failing to order Husband to pay court reporter's fees and appraiser's fees incurred by Wife.

After trial, Wife filed a motion for attorney's fees accompanied by her attorney's affidavit, her attorney's time statement, and an itemization of costs. In the affidavit, Wife's attorney attested as follows:

> The total billed to [Wife] this date is attorney's fees and assistant's time in the amount of $6,255. I advanced court cost, court reporter fees and the appraiser's fee, a total of $2,104.13, making the total billed for costs and fees and expenses of trial preparation, $8,359.13.

By order entered February 20, 2006, the trial court ordered that Husband pay Wife $6,000 for "attorney's fees *and costs incurred*." (Emphasis added). The order does not state what portion of this $6,000 constituted attorney's fees and what portion constituted expenses incurred or which expenses were allowed. However, because the court's order specified that some portion of the $6,000 that Wife was awarded consisted of costs incurred, we cannot conclude that the trial court failed to award the costs now requested. In any event, it is well settled that a trial court's ruling with respect to discretionary costs will not be altered on appeal absent proof of a clear abuse of discretion. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992). Upon our review of the record, we do not agree that the trial court abused its discretion in failing to award Wife the costs now requested, to the extent that such costs were not awarded.

D. Alimony

The final issue, raised by Husband, is whether the rehabilitative alimony awarded Wife in the amount of $1,800 per month for five years was excessive.

T.C.A. § 36-5-121(i) provides that, in determining whether payment of spousal support is proper and in determining the proper form and amount of such support, a trial court must consider all relevant factors, including the following:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
> (3) The duration of the marriage;
> (4) The age and mental condition of each party;
> (5) The physical condition of each party; including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
> (6) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
> (7) The separate assets of each party, both real and personal, tangible and intangible;
> (8) The provisions made with regard to the marital property as defined in § 36-4-121;
> (9) The standard of living of the parties established during the marriage;
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
> (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

This Court has noted that, while all of the above factors - to the extent relevant to the facts of a given case - should be considered in determining spousal support, "the two most important factors are the demonstrated need of the disadvantaged spouse and the obligor spouse's ability to pay." *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998).

Husband indicates that Wife has not demonstrated need justifying the trial court's award of alimony, noting that Wife is currently voluntarily employed part-time at $8.00 per hour even though she is capable of earning "at least $8 per hour 40 hours per week." The record confirms that Wife realizes gross income of $970 per month for working 26 to 27 hours a week as an occupational therapist aide. Wife admits that if she worked 40 hours per week, she could earn gross income of $1,300 per month. Husband presents no proof that Wife is currently capable of earning in excess of $8.00 per hour, and the amount of additional income wife foregoes by failing to work full-time

is, as a practical matter, of little consequence, particularly given the standard of living the parties established during their marriage. Wife only has a high school education and, unlike Husband, has apparently developed no job skills or experience which qualify her for more lucrative employment. Wife's income and expense statement shows that her expenses exceed her income by approximately $4,000 and if Wife worked full time her income would still remain seriously inadequate. For these reasons and based upon our careful review of the record otherwise, we do not agree that Wife has failed to demonstrate need warranting the trial court's award of alimony.

Husband argues that he does not have the ability to pay the amount of alimony awarded. Although during the three years preceding divorce Husband's gross income including overtime and *per diem* living allowance was between $110,000 and $130,000 per year, Husband contends that his earnings will diminish in the future. He argues that there is no evidence in the record that he will continue to be employed outside the country receiving overtime or per diem and that he has no guarantee of receiving the income he has received in the past.

The record shows that Husband has been employed by the Bechtel Corporation for over twenty-five years, and Husband's testimony indicates that his job is, as a general matter, very secure:

> I'm a full-time employee as long as there's work available, as long as they have a job for me to go to. If they don't, I get laid off and I come back to work when they do. I've only been laid off once for three months about two years ago. So I stay pretty busy with them.

Considering the amount of income Husband has earned during the past few years, his employment history, including his ability to find higher-paying employment outside of the United States during recent years, and his above testimony regarding the ongoing availability of employment with Bechtel Corporation, we do not agree the future decrease in earnings predicted by Husband was sufficiently certain to justify a decrease in the trial court's alimony award. We further note that if Husband does in fact suffer a decrease in his future income, he may at that time petition the trial court for an appropriate reduction in his support obligation pursuant to T.C.A. § 36-5-121(e)(2), which provides in pertinent part that "[a]n award of rehabilitative alimony shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change in circumstances."

In summary, we find that the trial court's award of alimony was supported by the evidence and was appropriate in amount and duration based upon consideration of the statutory factors, Wife's need, and Husband's ability to pay.

V. Conclusion

For the reasons stated herein, we affirm the judgment of the trial court. Costs of appeal are adjudged against the appellant, Donna Melinda White.

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SHARON G. LEE, JUDGE